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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

SEP 22 1987

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on Federal Superfund Liens

FROM: Thomas L. Adams, Jr.
Assistant Administrator

A handwritten signature in dark ink, appearing to read "Thomas L. Adams, Jr.", with a large, sweeping flourish extending to the right.

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Directors, Waste Management Division,
Regions I-X

The purpose of this memorandum is to establish guidance on the use of federal liens to enhance Superfund cost recovery. Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), adds a new Section 107(1) to CERCLA, which provides for the establishment of a federal lien in favor of the United States upon property which is the subject of a removal or remedial action.

This guidance provides: (1) analysis of statutory issues regarding the nature and scope of the lien, (2) policy on filing a federal lien to support a cost recovery action, and (3) procedures for filing a notice of lien and taking an in rem action to recover the costs of a lien. Attached to the guidance is an example of a notice of a Superfund lien.

I. STATUTORY BACKGROUND AND ISSUES

A. Property Covered by Lien

Section 107(1) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States upon all real property and rights to such property which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. The lien applies to all property owned by the PRP upon which response action has been taken, not just the portion of the property directly affected by cleanup activities. The House Judiciary Committee Report on the lien

provision in H.R. 2817 (p. 18), which was enacted as part of SARA, states that "the lien should apply to the title to the entire property on which the response action was taken." At the same time, the Report notes that "it is not intended to extend the lien to the title of other property held by the responsible party." Id.

The lien provision is designed to facilitate the United States' recovery of response costs and prevent windfalls. "A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from fund cleanup and restoration activities." 131 Cong. Rec. S11580 (Statement of Sen. Stafford) (September 17, 1985). See also House Energy and Commerce Report on H.R. 2817, p. 140, indicating that one of Congress' primary purposes in enacting the lien provision was to prevent unjust enrichment.

B. Duration and Effect of Lien

The federal lien arises "at the later of the following: (A) the time costs are first incurred by the United States with respect to a response action under [SARA, or] (B) the time that the person is provided (by certified or registered mail) written notice of potential liability." (Emphasis added) (§107(1)(2)). EPA may send out two different types of notice letters to PRPs. The first, a general notice letter, will be sent early in the process notifying the recipient that he or she has been identified as a party who may be responsible for cleanup of the site or for the costs of cleanup. In addition, the Agency may send a subsequent "special" notice which will invoke and commence the settlement procedures in Section 122 of SARA. The first of those letters will satisfy the notice of potential liability required for the federal lien to arise, assuming that it does give the PRP notice of potential liability for cleanup of costs, and is forwarded by certified or registered mail.

It is EPA's position that the lien provision applies to costs incurred prior to and after passage of SARA. The lien also applies to all future costs incurred at the site. The lien continues "until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113." (§107(1)(2))

C. Priority of Federal Lien In Relation to Other Property Liens

The federal lien is "subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of

the federal lien has been filed [by EPA]." (§107(1)(3)) Thus, the unfiled federal lien is subordinate to rights that are perfected under applicable State law before EPA files notice of its federal Superfund lien. After EPA files notice of the federal lien, the United States establishes its priority ahead of known and potential purchasers, holders of security interests, and judgment lien creditors whose interests have not been perfected.

During deliberation on the Superfund amendments, Congress considered a provision in H.R. 2005 [S. 51] which provided for constructive notice of an EPA lien. Under that provision, if EPA failed to file its notice of lien in a timely fashion, the EPA lien would nonetheless have had priority over a third party lien which was filed prior in time if the third party had or reasonably should have had actual knowledge that EPA had incurred costs which would have given rise to a lien. See Environment and Public Works Report on S. 51, p. 45. Thus, since this provision was ultimately deleted from the Act, EPA must file its lien in order to achieve priority over any other secured parties, and cannot rely on constructive notice.

D. State Superfund Liens

Most States have passed "Superfund" statutes similar to the federal law. However, a State Superfund lien only applies to response work paid for by a State. Some of the State statutes, such as those in Massachusetts, New Hampshire, New Jersey, Arkansas and Tennessee, contain "superlien" provisions which provide that any expenditures made pursuant to the statute constitute a first priority lien upon the real property of a hazardous waste discharger. Several other States provide that expenditures from the hazardous waste fund will constitute a lien in favor of the State, although not a first-priority lien.

II. POLICY ON FILING FEDERAL LIENS IN COST-RECOVERY ACTIONS

EPA has the authority to file notice of a lien on any real property where Superfund expenditures have been made. Regional offices should carefully evaluate the value of filing notice of a lien whenever the Agency has identified a landowner as a potentially liable party under Section 107. Filing of notice of the federal lien will be particularly beneficial to the government's efforts to recover costs in a subsequent Section 107 action in the following situations:

- (1) the property is the chief or the substantial asset of the PRP;
- (2) the property has substantial monetary value;

- (3) there is a likelihood that the defendant owner may file for bankruptcy. See Revised Hazardous Waste Bankruptcy Guidance, Office of Enforcement and Compliance Monitoring, May 23, 1986;
- (4) the value of the property will increase significantly as a result of the removal or remedial work; or
- (5) the PRP plans to sell the property.

Regional offices should not file notice where it appears that the defendant satisfies the elements of the innocent landowner defense pursuant to Section 107(b)(3).

Where existing perfected non-Superfund liens on the property equal or exceed the value of the property as enhanced by the Superfund expenditures, it may not be worthwhile to file notice of the federal lien. However, in some cases, a foreclosing party, such as a bank, may take over the property, and EPA may believe that the foreclosing party is liable under Section 107. See United States v. Maryland Bank and Trust Co., 632 F. Supp. 573 (D. Md. 1986). In such cases, EPA should file a lien as to the foreclosing party after foreclosure and after other acts creating liability have taken place.

Pursuant to Section 545(2) of the Bankruptcy Code, a lien unperfected as of the time of filing of the bankruptcy petition will be invalidated by the bankruptcy trustee. Thus, where there is a likelihood of a bankruptcy filing, notice of the Superfund lien should be filed as early as possible. Finally, note that filing notice of the lien is not subject to pre-enforcement review of the liability of the landowner for the response costs.^{1/}

III. PROCEDURES FOR FILING LIENS

Notice of the federal lien should be filed at the time that the owner is provided notice of potential liability. By this time, the lien will have arisen since EPA will have incurred costs, e.g.,

^{1/} Courts have rejected claims that owners are entitled to notice and hearing prior to filing of the lien. In Spielman Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz.) (3 judge court), summarily aff'd, 417 U.S. 901 (1974), the court held that filing of a mechanic's lien did not amount to a taking of significant property without due process, since it did not prohibit the transfer of title. Subsequent court decisions have followed this holding. See, e.g., B & P Development v. Walker, 420 F. Supp. 704 (W.D. Pa. 1976).

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in conducting a PRP search. The government's priority will relate back to the date that the notice of the lien was filed. See Uniform Commercial Code, §9-312(5)(a). Unlike some State Superfund lien provisions, Section 107 does not establish a deadline by which notice must be filed.

A. Preparing the Notice

Regional enforcement personnel should refer to State requirements for filing notice of the lien. We encourage the Regions to work with State Attorney General Offices to assure that the Regions accurately interpret State law, and to consult with OECM and DOJ in determining whether to file notice of the lien.

Notice should generally include: (1) the name of the property owner, (2) a precise legal description of the property on which the lien will arise, (3) an explanation by the Regional official of the basis for the lien, (4) the address of the Regional Administrator or other Regional official delegated authority to sign notices of liens, and (5) a provision that the lien shall remain until all liability is satisfied. The notice should cite CERCLA Section 107(1) and be notarized with the Agency seal.

Notice may also include such information as: (1) the amount of fund expenditures upon which the lien is claimed and (2) a description of labor performed and materials supplied, including dates. However, since the statute does not require specification of costs, the notice should clarify that, where response work is ongoing, the amount of the lien will increase as the costs incurred increase. The property description to be included in the notice of the lien should be the legal description (i.e., metes and bounds, or lot, block and subdivision) rather than a general post office or street address. We have attached an example of a notice of a federal lien.

Under the recent SARA delegation, the Regional Administrator has been delegated authority to sign the notice of filed lien. The Regional Administrator may redelegate this authority at his/her discretion.

B. Where to File

To establish its priority among other secured parties and creditors, EPA must file notice of the lien "in the appropriate office within the State (or county or other governmental subdivision), as designated by State law, in which the real property subject to the lien is located." (§107(1)(3))

Where the State has designated an office, such as a County recording office, the lien should be filed in that office. This will likely be the same office where State Superfund liens are filed or where general real property liens, e.g. mechanic's liens, are filed. "If the State has not by law designated one office for the receipt of such notices of liens, the notice shall be filed in the office of the clerk of the United States district court for the district in which the real property is located." (§107(1)(3))

Where there is any doubt as to the designated State office, the lien should be filed both in the office of the clerk of the United States district court for the district in which the real property is located and in the most appropriate local office for recording property interests. Filing in the appropriate local office is important, since parties with an interest in the property are more likely to review liens in the local office than in federal district court.

IV. IN REM ACTIONS FOR RECOVERING COSTS CONSTITUTING THE LIEN

Under Section 107(1)(4), "[t]he costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred." An in rem action is an action against the property of the PRP. In order to institute a proceeding in rem, the property must "be actually or constructively within the reach of the court." 36 Am. Jur. 2d Forfeitures and Penalties §28 (1968). By contrast, the typical cost recovery action is an in personam action against the PRP.

In rem actions should be considered where the litigation team believes that an action to recover costs covered by the lien will enhance its efforts to recover all costs incurred in a response action. Such actions will be particularly useful where the property constitutes a significant asset of the PRP, and where the government is having difficulty reaching an expeditious cost recovery settlement. The in rem action, which will seek an order directing sale of the property,^{2/} should generally be combined with an in personam action for costs. Before bringing an in rem action, the regional office should consider the amount of the claim, the

^{2/} An in rem action may be delayed by an automatic stay, obtained in a bankruptcy proceeding, which serves to stay "any act to create, perfect, or enforce any lien against property of the estate." (Emphasis added) 11 U.S.C. §362(a)(4). The automatic stay also prohibits perfection of a lien, through filing notice of the lien, against a bankruptcy debtor.

condition of the site after the response action and the likely marketability of the site. Note that an in rem action will require the same elements of proof as any cost recovery action.

Section 107(1)(4) further states that "[n]othing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section." Thus, where the government seeks to enforce the federal lien, it is not precluded from recovering the balance of its response costs directly from the landowner or any other liable party.^{3/}

DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

Attachment

^{3/} Moreover, after EPA obtains a judgment, it should consider using state judgment lien provisions, which may cover all real property of the debtor.

NOTICE OF FEDERAL LIEN

NOTICE IS HEREBY GIVEN by the United States of America that it holds a lien on the lands and premises described below situated in the State of Washington, as provided by Section 107(f) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Public Law No. 99-499, amending the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601 et seq., to secure the payment to the United States of all costs and damages covered by that Section for which Western Processing Company, Inc. and Garret J. Nieuwenhuis (and the marital community composed of himself and his wife) are liable to the United States under Section 107(a) of CERCLA as amended. The lien for which this instrument gives notice exists in favor of the United States upon all real property and rights to such property which belong to said persons and are, have been, or will be, subject to, or affected by, removal and remedial actions as defined by federal law, at or near 7215 South 196th in the City of Kent, County of King, State of Washington, including the following described land:

That portion of the Southeast Quarter (S.E. 1/4) of the Northwest Quarter (N.W. 1/4) of Section One (1), Township Twenty-Two (22) North, Range Four (4) East, Willamette Meridian, lying Westerly of the Puget Sound Electric right-of-way less than North Thirty (30) feet of Drainage Ditch No. One (1), containing 12.9 acres more or less.

This statutory lien exists and continues until the liability for such costs and damages (or for any decree or judgement against such persons arising out of such liability) is satisfied or becomes unenforceable through the operation of the statute of limitations as provided by Section 113 of Public Law 99-499.

IN WITNESS WHEREOF, the United States has caused this instrument to be executed through the United States Environmental Protection Agency, and its attorney, in his official capacity as Regional Counsel of the United States Environmental Protection Agency, Region 10.

Dated at Seattle, Washington, this 23^d day of JANUARY, 1987.

UNITED STATES OF AMERICA and
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

United States Of America)
State of Washington) ss
County of King)

By: John T. Hamill, Acting
James R. Moore
Regional Counsel
U.S. EPA, Region 10

On this 23^d day of JANUARY, 1987, there appeared personally before me, the undersigned Notary, James R. Moore, known to me to be the Regional Counsel of the United States Environmental Protection Agency, Region 10, and he acknowledged that he signed the foregoing NOTICE OF FEDERAL LIEN in a representative capacity as the free and voluntary act and deed of the United States and its said Agency for the uses and purposes therein mentioned. GIVEN under my hand and official seal the day and year first stated above.

Valerie D. Baden
NOTARY PUBLIC in and for the State
of Washington residing at Seattle

My Commission Expires: 12/7/90



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EC-G-1998-94

JUL 29 1993

MEMORANDUM

SUBJECT: Supplemental Guidance on Federal Superfund Liens

FROM: William A. White *[Signature]*
Enforcement Counsel
Office of Enforcement/Superfund

Bruce M. Diamond *[Signature]*
Director
Office of Waste Programs Enforcement

TO: Regional Counsels, Regions I-X
Directors, Waste Management Divisions,
Regions I-X

The purpose of this guidance document is to supplement the "Guidance on Federal Superfund Liens" issued on September 22, 1987, by memorandum signed by Thomas L. Adams, Jr., Assistant Administrator of the Office of Enforcement and Compliance Monitoring (now Office of Enforcement). This Supplement is in addition to, and does not supersede the 1987 document, which provided criteria for the decision to file liens under Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(1). This Supplement outlines procedures for Regional staff to follow to provide notice and opportunity to be heard to potentially responsible parties on whose property liens are to be perfected.

I. SUMMARY

The Agency should provide notice to property owners who are potentially responsible parties ("PRPs") under CERCLA that the Agency intends to perfect a lien on their property prior to filing papers to perfect. The Agency will give such property owners¹ the opportunity to be heard through their submission of documentation or through appearing before a neutral EPA official, or both. In exceptional circumstances, EPA may perfect a lien

¹ For purposes of this guidance, owner means persons possessing title to real property or rights to such real property, as set forth in Section 107(1)(1) of CERCLA, 42 U.S.C. § 9607(1).

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prior to giving notice to a property owner of EPA's intention to perfect the lien, but the Agency should concurrently notify the owner and offer an opportunity to be heard at the earliest practicable time.

The Agency should send a letter by certified mail notifying property owners of the Agency's intention to perfect a lien, or, if appropriate, immediately upon perfection. The letter should summarize the factual basis for EPA's reason to believe that the statutory criteria for perfecting a lien are satisfied. The letter should inform the recipient property owner of his or her opportunity to be heard, either by submitting documentation or by obtaining a meeting conducted by a neutral official. The meeting will consist of an informal proceeding in which the property owner may provide EPA with information as to why EPA's assumptions require reconsideration.

II. PROCEDURES

Record of Decision to File

After consulting the 1987 Guidance on Federal Superfund Liens to determine whether the perfection of a Superfund lien is of value, staff designated by the Region should assemble a Lien Filing Record, bringing together in one place all the documents relating to the decision to perfect.

Provisions for maintenance of the Lien Filing Record are at the discretion of the Region, and it may choose to maintain the record in the same manner that it maintains other Superfund records. At a minimum, however, the Region should ensure that certain personnel are designated to add relevant documents, maintain the integrity of the record, and make the record reasonably available, upon request, to the property owner. The Region may wish to have the Regional Hearing Clerk maintain the Lien Filing Record once a property owner requests a meeting.

The following categories of documents should be assembled:

1. Documentation that the potentially responsible party is the owner of the property, e.g., the file contains a deed, legal description from a survey or tax record, a title search, etc.
2. Documents showing that EPA has actually incurred costs at the site (a summary report of costs is sufficient for this purpose; underlying documentation is not necessary).
3. Documents showing that the property owner was provided (by certified mail) written notice of potential liability, pursuant to CERCLA Section 107(1).

4. Documents describing the property showing that the property or that part of a property is contaminated and showing that the property has been subject to or affected by a removal or remedial action. Examples include action memoranda, removal response reports, Preliminary Assessment or Site Inspection forms, or National Priorities List listing documents. (The Region may choose to include a declaration by the On-Scene Coordinator or Remedial Project Manager ("RPM") incorporating these elements.)
5. Where applicable, any documents describing exceptional circumstances which support EPA's decision to perfect a lien prior to offering an opportunity to be heard. Such circumstances include instances in which the property owner is about to take some action that would render the property unavailable to satisfy a judgment for clean-up costs or where EPA's interest in the property would be impaired. Examples include, but are not limited to, imminent bankruptcy of the property owner, imminent transfer of all or part of the property, or imminent perfection of a secured interest which would have priority under applicable state law, or indications that these events are about to take place. Where the Regional staff are depending on factual information that is not a matter of public record, they should include in the file a supporting statement (a) from someone with first hand knowledge of the facts, or (b) indicating the factual basis on which the Agency proposes to act, and the source of the Agency's information.

The Region should continue to add relevant documents to the Lien Filing Record, such as the following:

1. EPA's notice of intent to file a lien (see below) sent to the property owner, with proof of receipt (or proof of mailing to the last known address).
2. Any documentation submitted by the property owner to show that EPA did not satisfy the statutory criteria for perfection of a lien or that EPA was in error when it concluded that the criteria were satisfied. This documentation may include correspondence, or documents submitted at or after any meeting request by the property owner.
3. Any responses by the Region to the property owner's submissions.
4. Any correspondence between the Region and the property owner relating to the filing of a lien.

5. Any form of record of a meeting held regarding the perfection of the lien.

The Region should maintain the Lien Filing Record and, upon request made to the Regional Attorney, make it reasonably available to the property owner.

The Notice of Intent to Perfect a Superfund Lien

This guidance includes a model notice letter (See Attachment 1) to inform the property owner of the Region's intention to file and perfect a notice of lien. A notice letter should be mailed to the owner by certified mail, return receipt requested. The letter should state that EPA intends to perfect its lien after a set number of calendar days, e.g., 14 days, from mailing. In the letter, the Region should also notify the property owner of the location and availability for review and copying of the Lien Filing Record.

The notice of intent to perfect should contain the following elements:

1. A statement that land records of the appropriate state or county indicate that the recipient is the owner of the subject property, with a citation to those records.
2. A precise identification of the property, using the street address and a deed, or reference to a deed or other legal description in land records.
3. Statements that: EPA has a reasonable basis to perfect its lien; the property is a facility as defined in CERCLA Section 101(9); the Agency has reason to believe that the owner "owns" the facility and that the owner is a liable person pursuant to CERCLA Section 107(a); the property is subject to or affected by a removal or remedial action; and costs have been incurred by the United States with respect to a response action at the property.
4. In satisfaction of CERCLA Section 107(1)(2)(B), reference to previous written notice of potential liability furnished to the property owner, or notice via this letter, if notice has not already been furnished.
5. Notice that the lien shall remain in effect until liability for the costs is satisfied or the lien becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

6. A statement that the property owner may submit any documents or information relevant to the issues raised by the lien in writing to the Regional attorney assigned to the site prior to the expiration of the time period stated in the notice.
7. An invitation for the recipient to request, prior to the expiration of the time period stated in the notice, an opportunity to be heard before a neutral EPA official. This request should be in writing and addressed to the named Regional attorney.
8. A statement that the subject of any requested meeting shall be whether EPA has [or had] a reasonable basis to perfect a lien upon the property based upon the statutory elements.
9. A statement that neither EPA nor the property owner waives or is prohibited from asserting any claims or defenses by the submission of information, a request for and participation in a meeting, or a recommended decision by the neutral official whether or not EPA has a reasonable basis to perfect a lien.
10. Where EPA has perfected its lien prior to sending this notice of intent, a statement describing the circumstances that led the Agency to perfect the lien in order to protect EPA's interest in the property and how those interests were about to be impaired. The statement should further indicate that the property owner may still make a timely request for a meeting to demonstrate that the EPA had no reasonable basis to perfect its lien.

Perfection of a Lien Prior to a Meeting

The Agency may, in exceptional circumstances, perfect a lien prior to offering or providing a property owner with a meeting. Thus, even where the Region has notified a property owner that he or she has an opportunity to request a meeting, under certain exceptional circumstances, the Region may perfect a lien prior to providing that meeting. The Region shall send notice to the property owner, return receipt requested, immediately upon perfection. A model letter for post-perfection notification is included as Attachment 2. Exceptional circumstances for this course of action include, but are not limited to, instances in which EPA's interest in the property could be impaired, such as imminent bankruptcy of the property owner, imminent transfer of all or a portion of the property, imminent perfection of a secured interest which would have priority under applicable state

law, or indications that these events are about to take place. As noted in the section on the Lien Filing Record, Regional staff should document any such circumstances in the Lien Filing Record.

While the procedures and standards to be followed for a post-perfection meeting are similar to those for a pre-perfection meeting, the Region should expedite to the extent possible the holding of a post-perfection meeting, if one is requested.

Property Owner's Response

- Failure of Property Owner To Timely Respond

If a property owner does not respond within the period set for response, the Region may proceed to perfect the lien. At the time of perfection, the Region should send a letter notifying the owner of the date the lien was perfected.

- Timely response: Written Response and No Request for Meeting

If a property owner presents written documentation in a timely manner purporting to show that the lien should not be perfected, but does not request a meeting, the Regional site attorney should review the documentation furnished. If the Region agrees that the property owner has produced facts to alter EPA's determination that it has a reasonable basis to file the lien, EPA should so notify the property owner.

If the Regional attorney determines that EPA still has a reasonable basis to perfect its lien, the Region should select a neutral official in accordance with the process described below to review the documentation furnished. At the conclusion of the neutral official's review, he or she should provide the property owner and Regional staff with a brief written recommended decision on whether EPA has a reasonable basis to perfect a lien. The document should set out the informational basis upon which the recommended decision is made, and should be placed in the Lien Filing Record, with a copy forwarded to the official in the Region delegated with the authority to sign liens for action.

- Timely Response: Request for Meeting

If a property owner requests a meeting, the Region shall select a neutral official in accordance with the process described below to conduct the meeting. The neutral official shall set up the time and location of the meeting, or offer the property owner a meeting via teleconference.

Meeting Procedures

- Selection of Neutral Official

The neutral official selected by the Region should be an attorney who is a permanent or temporary employee of the Agency and who may perform other duties within the Agency. The person selected should not have performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved.

Regions may have judicial or presiding officers already appointed pursuant to other EPA programs who possess the qualifications outlined above. Where the Regions do not wish to select separate neutral officials to hear lien matters on a case-by-case basis, they may allow these hearing officers to conduct lien meetings.

Upon selection of the neutral official, the designated keeper of the Lien Filing Record should provide the official with a copy of the Lien Filing Record, which includes any written response by the property owner and any subsequent supporting documentation submitted by the property owner.

- Factors to Review

The neutral EPA official should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien. In particular, the neutral official should consider whether:

- The property owner was sent notice of potential liability by certified mail.
- The property is owned by a person who is potentially liable under CERCLA.
- The property is subject to or affected by a removal or remedial action.
- The United States has incurred costs with respect to a response action under CERCLA.
- The record contains any other information which is sufficient to show that the lien notice should not be filed.

The property owner may present information or submit documents purporting to establish that EPA has erred in believing that it has a reasonable basis to perfect a lien based on the above factors, or has made a material error with respect to the

above factors. In making his or her decision, the neutral EPA official should consider all facts in the Lien Filing Record established for the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record.

- Nature of the Meeting

The persons at the meeting normally should include the property owner (and/or an attorney, at the property owner's option); Regional enforcement staff (RPM and Regional attorney and any other appropriate Region officials); and the neutral official.

The meeting ordinarily should be held at the EPA Regional office. As stated above, the neutral official may offer to conduct the meeting by telephone for the convenience of the property owner. The neutral official should also ensure that a record of the meeting is made. If a summary of the meeting is prepared as a record, it should indicate who was in attendance, what information was presented, and what issues were discussed. Any such summary should be provided to the property owner. The record of the meeting, and any comments submitted by the property owner on the summary should be included as part of the Lien Filing Record.

The neutral official should conduct the meeting as an informal exchange of information, not bound by judicial or administrative rules of evidence. Because of the informal nature of these proceedings, EPA will not apply the Administrative Procedure Act provisions for formal adjudication.

The neutral official should begin the meeting by making an opening statement, containing the following elements:

1. The proceeding is informal, and not bound by rules of evidence nor provisions of the Administrative Procedure Act.
2. Neither EPA nor the property owner waives any claims or defenses by the conduct of the meeting or the outcome.
3. The sole issue at the meeting is whether EPA has (or had, in the case of a post-filing meeting) a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. The meeting will not be concerned with issues not relating to the proposed perfection of the lien, including, but not limited to, EPA's selection of a remedy or contents of remedy selection documents, such as records of decision or action memoranda.

4. The neutral official will make a recommended decision, based on the Lien Filing Record and any new information presented at the meeting, whether EPA has (or had) a reasonable basis to perfect the lien.
5. The recommended decision is not admissible as evidence in any future proceeding.

The neutral official should conduct an orderly and fair meeting. Regional staff may present EPA's reason to believe that a lien may be perfected upon the property. The property owner or his or her counsel shall have a reasonable opportunity to address relevant issues and present his or her views. The neutral official may also allow discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or the property owner an opportunity to engage in direct examination or cross-examination of witnesses. The neutral official may address questions to the property owner or his or her counsel or to EPA's representatives during the meeting.

While the neutral official should place no limitations other than reasonableness on the type or volume of information presented or issues discussed, he or she may caution that only information and issues which are relevant or material to EPA's decision as to whether it has a reasonable basis to perfect the lien will be ultimately considered.

Recommended Decision

In a timely manner, the neutral official should issue a written recommended decision. The recommended decision should state whether the property owner has established any issue of fact or law to alter EPA's decision to file a notice of lien and the informational basis upon which the decision is based. The recommended decision should contain a statement that neither EPA nor the property owner is barred from any claims or defenses by the recommended decision. The recommended decision should be placed in the Lien Filing Record, with a copy forwarded to the official in the Region delegated with the authority to sign liens for action, and a copy sent to the property owner.

Because of the preliminary and informal nature of the proceedings under this guidance, and the fact that the neutral officer's recommended decision is limited to whether EPA has a reasonable basis to perfect the lien, the neutral official's recommended decision is not a binding determination of ultimate liability or non-liability. No preclusive effect attaches to any decisions made in the course of any proceeding pursuant to the guidance, nor shall any such decisions be given deference or otherwise constitute evidence in any subsequent proceeding.

The Agency may subsequently provide notice of intent to perfect a lien with an opportunity to be heard with respect to the same property under these procedures if new information indicates that a previous decision not to file is in error.

Except as provided by CERCLA Section 113(h), property owners may not obtain judicial review or reconsideration of the Agency's decision that it has a reasonable basis to perfect a lien.

III. DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute a rulemaking by the Agency and may not be relied upon to create a specific right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

IV. FURTHER INFORMATION

For further information concerning this policy, please contact Patricia Mott in the Office of Enforcement at (202) 260-3733 or Gary Worthman in the Office of Waste Programs Enforcement at (703) 603-8951.

Attachments (2)

Attachments (2)

----- ATTACHMENT -----

ATTACHMENT 1

MODEL: PRE-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION []
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") intends to perfect a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA intends to perfect against the Property arises under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. Section 9607(l). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. Sections 9607(a) and 9701(9), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section 101(22) has occurred at or from the Property. The Property is part of the [] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified or registered mail of your potential liability under CERCLA [or EPA hereby furnishes notice, if notice has not already been furnished.] You may avoid the perfection of a lien upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. After [14 calendar days or other period, set by the Region] from the date of this letter, EPA intends to transmit a notice of lien to [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. The effect of this filing is to perfect the lien upon your property.

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA does not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA does not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and reconsider its intention to perfect a lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency does not have a reasonable basis upon which to perfect a lien, EPA will not perfect its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA has a reasonable basis to perfect a lien based upon CERCLA Section 107(1).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA has a reasonable

basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether perfection or the decision not to perfect) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to perfect a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator

----- ATTACHMENT -----

ATTACHMENT 2

MODEL: POST-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION []
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") has perfected a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA has perfected against the Property arises under Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. Section 9607(1). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. Sections 9607(a) and 9701(9), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section

101(22) has occurred at or from the Property. The Property is part of the [] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified mail of your potential liability under CERCLA. You may satisfy the lien placed upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. EPA has perfected its lien by filing a notice of lien with [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. EPA perfected its lien prior to notifying you of its intention because [].

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA did not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA did not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and release its lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency did not have a reasonable basis upon which to perfect a lien, EPA will release its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA had a reasonable basis to perfect its lien based upon CERCLA Section 107(1).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA had a reasonable basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether the lien will stay in place or be released) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to file a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator
